

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

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IN RE:

PHILIP J. MAITLAND

CASE NO. 04-60901

Debtor

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MARY MAITLAND

Plaintiff

vs.

ADV. PRO. NO. 04-80133

PHILIP J. MAITLAND

Defendant

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APPEARANCES:

CAMPANIE & WAYLAND-SMITH PLLC

Attorney for Plaintiff  
60 East State Street  
PO Box 70  
Sherrill, NY 13461

TINA M. WAYLAND-SMITH,  
ESQ.  
Of Counsel

RONALD W. WOLSEY, ESQ.  
Attorney for Defendant  
PO Box 22  
Cazenovia, NY 13035

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

**MEMORANDUM-DECISION, FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER**

Under consideration by the Court is an adversary proceeding commenced by the filing

of a complaint on May 4, 2004,<sup>1</sup> by Mary Maitland (“Plaintiff”) seeking a determination that a debt owed to her by Philip J. Maitland (“Debtor”) is nondischargeable pursuant to Code § 523(a)(15). Issue was joined by the filing of an answer by the Debtor on June 4, 2004.

The trial was initially scheduled to be held on August 30, 2004, and was adjourned first to September 20, 2004, and then to October 18, 2004, on the consent of the parties. Ultimately, the trial was held on December 13, 2004, in Utica, New York. Following testimony from both parties, the Court requested that they file memoranda of law in lieu of closing arguments. The matter was submitted for decision on January 18, 2005.

### **JURISDICTIONAL STATEMENT**

The Court has core jurisdiction over the parties and subject matter of this adversary proceeding pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1) and (b)(2)(I).

### **FACTS**

On January 21, 2000, the Honorable William F. O’Brien, III, Justice of the New York State Supreme Court for the County of Madison (“State Court”), granted a Judgment of Divorce to the Plaintiff. *See* Plaintiff’s Exhibit 1. At the time of the Judgment of Divorce, there was approximately \$27,190 in what was described as marital debt, including a \$1,700 vacation fund

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<sup>1</sup> The deadline for filing a complaint objecting to the dischargeability of debts pursuant to § 523(a)(15) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (“Code”), was May 17, 2004.

cashed in and spent by the Debtor; \$907 claim of the Internal Revenue Service; \$1,200 in back rent; a \$900 line of credit; \$1,017 in unpaid medical expenses; \$17,265 in school loan debt used for support and family living expenses; \$200 in miscellaneous costs; and \$4,000 for Plaintiff's attorney's fees. Under the terms of the Judgment of Divorce, the Debtor was required to pay the Plaintiff \$13,595, representing one half of the marital debt, in weekly installments of \$50 over 272 consecutive weeks. *Id.* Because both parties were capable of self-support, the Judgment of Divorce provided that there would be no payment of support or maintenance to either party. The Debtor was required to make child support payments to the Plaintiff in the amount of \$160.69 per week. At the time of the Judgment of Divorce, there were three unemancipated children who were to continue residing with the Plaintiff: Shannon, born August 4, 1983; Phillip, born April 21, 1986; and Samantha, born April 29, 1988. *Id.*

On October 23, 2002, Justice O'Brien signed an Order for the entry of a money judgment in favor of the Plaintiff in the amount of \$13,495, plus attorney's fees of \$600. *See* Plaintiff's Exhibit 2. In addition, the Order provided that the Debtor's employer, Leonard Riedl, deduct \$50 per week from the income of the Debtor to be applied to the money judgment. *Id.* A judgment to that effect was entered in the Madison County Clerk's office on October 28, 2002. *See* Plaintiff's Exhibit 3.

The Debtor filed a voluntary petition pursuant to chapter 7 of the Code on February 17, 2004. In his schedules, the Debtor listed the Plaintiff as holding an unsecured priority claim in the amount of \$13,000. *See* Schedule E, accompanying the Debtor's petition. The Debtor describes the claim as disputed "as to a student loan made by ex-wife." *Id.* In addition, the Debtor listed \$30,491.53 in general unsecured debt, all but approximately \$3,000 of which was

related to medical services. *See* Schedule F, accompanying the Debtor's petition.

The Debtor testified that he is 48 years old. He considers himself to be in fair health although he suffers from a bad back. At the time of trial, he resided in Morrisville, New York, with his girlfriend, Kathleen Campbell. He testified that the two shared household expenses although in December 2004 he was unable to contribute to them. He is employed by Leonard Riedl as a carpenter. He currently earns \$680 per week or \$35,360 per year gross. He testified that he nets \$290.60 per week after taxes and after deductions from his pay of approximately \$160<sup>2</sup> per week in child support and \$50 per week in payments to the Plaintiff in connection with the debt which is the subject of this proceeding. His car payment is \$396 per month. He estimated that he spends \$50 - \$75 per week in gas. He pays approximately \$153 per month for automobile insurance, and he estimates that he pays \$600 - \$700 per month for food. He also testified that he has no health benefits and no pension plan.

At the trial, the Debtor acknowledged that in February 2004 he had filed a certificate to do business as "Maitland Custom Carpentry" but that he had not done any work under that name because he could not afford the insurance connected with the business.

Plaintiff testified that she also resides in Morrisville with two of her children, Phillip who is 18 years old and Samantha who is 16 years old. She shares the house with another woman and her two children, ages 12 and 9. Plaintiff is currently working for Madison County BOCES, earning \$38,000 per year. She acknowledged that negotiations are ongoing in connection with a requested 4.75% pay increase. In acknowledging the monies paid to her each week by the

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<sup>2</sup> Plaintiff testified that she actually receives approximately \$177 per week from the Debtor, which includes arrears and a recent cost of living increase.

Debtor through wage garnishment, Plaintiff indicated that the Debtor had never sought to modify the amount he pays in child support.

The Plaintiff testified that she owns a Dodge minivan which is currently not operational. Therefore, she has been driving a vehicle belonging to the woman with whom she resides. In this regard, she testified that she contributes \$150 per month towards insurance on the vehicle. Her other expenses include \$500 per month in rent, \$800 per month for food, \$100 per month for heat and electricity, \$135 per month for insurance on her son's vehicle and \$200 per month for clothing for herself and her two children. She estimated that she currently had \$3,000 in credit card debt and also spends \$10-\$20 per month in co-pay prescription costs. She testified that she had incurred \$1,661 in medical costs in 2004, but testified that she would be reimbursed for 30% of the costs under her health coverage. Although she testified on cross-examination that she owned several horses which are used by her students at BOCES, no testimony was elicited concerning any expenses she might have in connection with the horses.

### **DISCUSSION**

Pursuant to Code § 523(a)(15), a debt incurred in the course of a divorce action or in connection with a divorce decree that is not for alimony, support or maintenance is excepted from discharge in a chapter 7 case, unless a debtor is able to establish by a preponderance of the evidence either that

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor . . . ; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

11 U.S.C. § 523(a)(15); *In re Williams*, 271 B.R. 449, 453 (Bankr. N.D.N.Y. 2001).

Neither party disputes that the debt in question is not for alimony, support or maintenance. Therefore, the Court must first make a determination whether the Debtor established that he does not have the ability to pay the debt after deducting “reasonable and necessary” expenses.

The Debtor testified that he nets \$290.60 per week, after taxes, child support and \$50 paid to Plaintiff pursuant to the State Court Judgement. The Court calculates that this amounts to monthly income of \$1,249.58. Based on his testimony, his monthly expenses amount to approximately \$1,264:

Food	\$ 650
Car payment	396
Car insurance	150
Gas	<u>68</u>
	\$1,264 <sup>3</sup>

The Court finds that even without including the expense of rent, utilities, clothing and medical coverage, the Debtor’s current monthly expenses exceed his current monthly income.

Courts have also considered a debtor’s “future disposable income calculated over a

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<sup>3</sup> The Court has averaged the Debtor’s estimates of the cost of food (\$600-\$700 per month) and gas (\$50-\$75 per month). In his petition, the Debtor listed \$200 per month in rent, \$130 per month for electricity, heat and telephone, \$50 per month for clothing and \$50 per month for medical and dental expenses. The Debtor testified that he shares some of those expenses with the woman with whom he is living. However, at the trial the Court was not presented with any evidence of the amounts being expended by the Debtor for such necessities. In fact, he testified that he had not been able to pay certain expenses that month because he “just doesn’t have it.” Without any testimony concerning those amounts, it is not possible for the Court to include any specific amounts in its calculations although it accepts the fact that the Debtor has such expenses.

reasonable period of time . . . .” *In re Hoberg*, 300 B.R. 752, 760 (Bankr. C.D. Cal. 2003); *see also In re Beggs*, 314 B.R. 401, 418 (Bankr. E.D. Ark. 2004), citing *In re Woods*, 309 B.R. 22, 27-28 (Bankr. W.D. Mo. 2004). Generally, it appears that in considering a debtor’s future earning capacity, the courts are weighing the possibility that the debtor will be able to pay the debt in installments. *See In re Johnson*, No. 02-04336, 2004 WL 764668 at \*4 (Bankr. N.D. Iowa Feb. 12, 2004); *In re McGunn*, 284 B.R. 855, 868 (Bankr. N.D. Ill. 2002) (citations omitted); *In re Haney*, 238 B.R. 432, 435 (Bankr. E.D. Ark. 1999). In the case *sub judice*, the Debtor is already paying the approximately \$13,000 debt in question owed to the Plaintiff in weekly installments of \$50. It is clear from the prior discussion that the Debtor is arguably unable to pay even that amount. He testified that he earned \$38,000 in 2003, and currently he is earning approximately \$35,360 annually. There is nothing in the testimony to indicate that this is likely to change in the reasonably foreseeable future. It is possible that he will be able to supplement his earnings if he is able to become self-employed, whether on a full or part-time basis. There is also the likelihood that at some point in the future, he will be relieved of the child support payments, particularly given the fact that one of his daughters is already 21 years of age and his son is 18 years of age. However, the potential for increased future income appears minimal. In addition, there is the fact that the Court’s calculations of the Debtor’s disposable income did not even include necessary expenses for rent, utilities, clothing and medical costs. The Debtor testified that he has experienced back problems and has no medical coverage. Indeed, the majority of the unsecured debts listed in his petition were comprised of medical bills that he apparently had been unable to pay. Unlike the Plaintiff, he appears to have no retirement savings.

Under these circumstances, the Court concludes that the Debtor does not have sufficient disposable income to continue to pay the debt of approximately \$13,000 owed to the Plaintiff. In reaching this conclusion, the Court is mindful of the fact that his current disposable income was calculated without inclusion of such necessary expenses as rent, utilities, clothing and medical costs because of the Debtor's failure to present evidence of any specific amounts, as noted previously. In the Court's opinion, it is reasonable to believe that those expenses would exceed the approximately \$215 per month currently being garnished from his wages which the Plaintiff seeks to be determined as nondischargeable. Under those circumstances, it is the conclusion of the Court that the Debtor's monthly expenses exceed his income. Therefore, the Court finds that the debt is dischargeable pursuant to Code § 523(a)(15)(A). Accordingly, the Court need not address Code § 523(a)(15)(B) which requires that the Court balance the benefit to the Debtor against the detrimental consequences to the Plaintiff.

Based on the foregoing, it is hereby

ORDERED that the Plaintiff's Complaint, to the extent that it seeks to have the debt owed to her by the Debtor be determined to be nondischargeable pursuant to Code § 523(a)(15), is denied, and the debt shall be subject to the Debtor's discharge in bankruptcy.

Dated at Utica, New York

this 24th day of February 2005

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STEPHEN D. GERLING  
Chief U.S. Bankruptcy Judge